

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RYAN PATRICK COBLEY,

Defendant-Appellant.

UNPUBLISHED

April 20, 1999

No. 204155

Shiawassee Circuit Court

LC No. 96-007655 FH

Before: Wilder, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of felonious assault, MCL 750.82; MSA 28.277, malicious destruction of property over \$100, MCL 750.377a; MSA 28.609(1), and escape from lawful custody, MCL 750.197a; MSA 28.394(1). As a fourth habitual offender, defendant was subject to an enhanced penalty pursuant to MCL 769.12; MSA 28.1084. The trial court sentenced defendant to concurrent terms of ten to fifteen years' imprisonment for the assault convictions, ten to fifteen years' imprisonment for the malicious destruction of property conviction, and 260 days' imprisonment for the escape conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred in sentencing him as an habitual offender because the prosecutor failed to serve notice of his intent to seek an enhanced sentence on defendant, as required by MCL 769.13; MSA 28.1085. We conclude that although the prosecutor's failure to serve notice upon defendant was technically a violation of the statute, such error was harmless because defendant had actual notice of this filing well before trial, and he did not suffer any prejudice by the lack of service.

It is undisputed that the prosecutor filed timely notice of his intent to seek an enhanced sentence based upon defendant's habitual offender status. In addition, the record indicates that the prosecutor informed the court, defendant and defense counsel at the arraignment that he "will be filing a supplemental information alleging him as a fourth time habitual offender." In fact, defense counsel did not contest that he received actual notice of the prosecutor's intent to file the supplemental information well in advance of trial, nor did he contest that the habitual offender charge was a factor that was used in ongoing plea negotiations. The proof of service requirement in MCL 769.13(2); MSA 28.1085(2) is

designed to ensure that a defendant promptly receives notice of the potential consequences of an habitual offender charge should he be convicted of the underlying offense. *People v Ellis*, 224 Mich App 752, 754; 569 NW2d 917 (1997). Thus, where there is no dispute that defendant was actually aware of the prosecutor's intent to file the habitual information, we conclude that defendant was not prejudiced by the prosecutor's noncompliance with the statute.¹

In a related argument, defendant contends that the prosecutor's failure to serve him with notice of the charge violated his due process right to be informed of the charges against him. We disagree. A defendant's right to adequate notice of the charges against him upon which he is to defend is guaranteed by the Due Process Clause of the Fourteenth Amendment. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). However, "prejudice is essentially a prerequisite to any claim of inadequate notice." *Id.* at 602, n 6, citing *People v Traugher*, 432 Mich 208, 215; 439 NW2d 231 (1989) ("[T]he dispositive question is whether the defendant knew what acts he was being tried for so he could adequately put forth a defense. Put another way, was the defendant prejudiced by the information[?]"). Here, defendant was aware of the charges against him, and had sufficient time and ability to fully defend against the supplemental information. *People v Walker*, ___ Mich App ___; ___ NW2d ___ (1999). Therefore, defendant's due process argument lacks merit.

Next, defendant contends that the trial court erred in allowing the prosecutor to amend the supplemental habitual information at sentencing to correct one of defendant's prior convictions from breaking and entering to attempted breaking and entering. We find no error. In *Ellis*, *supra* at 755-757, this Court held that the prosecution may not amend an otherwise timely supplemental information outside the twenty-one day period set forth in MCL 769.13(1); MSA 28.1085(1) to allege additional prior convictions that would, in effect, increase the level of the supplemental charge. However, the rationale employed in *Ellis* is inapplicable to a situation where the prosecutor merely seeks to correct an error, and the correction does not elevate the level of the supplemental charge. *Id.* at 757, n 2, citing *People v Manning*, 163 Mich App 641; 415 NW2d 1 (1987). We find *Ellis* to be correctly decided and decline defendant's invitation to reconsider that holding. Accordingly, because the amendment, albeit untimely, did not increase the severity of the habitual information charge, we conclude that the trial court correctly permitted the prosecutor to amend the supplemental information to reflect the correct prior conviction.

Finally, defendant contends that the trial court incorrectly calculated his sentencing guidelines' range and imposed a disproportionate sentence. We disagree. Defendant was sentenced as an habitual offender; hence, the sentencing guidelines do not apply, *People v Cervantes*, 448 Mich 620, 625-626; 532 NW2d 831 (1995); *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996), and may not be considered on appeal in determining the appropriate sentence, *People v Edgett*, 220 Mich App 686, 694; 560 NW2d 360 (1996). Instead, this Court's review is limited to whether the trial court abused its discretion in imposing defendant's sentence. *Cervantes*, *supra* at 627; *People v Elliott*, 215 Mich App 259, 261; 544 NW2d 748 (1996). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990). Thus, an habitual offender's sentence must comply with the principle of proportionality. *Id.* at 650.

Initially, we note that because the sentencing guidelines do not apply to habitual offenders, *Cervantes*, *supra* at 630, any error in calculating defendant's sentencing score is inconsequential. Moreover, after a thorough review of the record, we conclude that, contrary to defendant's contention, the trial court sufficiently articulated the reasons for defendant's sentence, focusing particularly on defendant's criminal history and the intolerable nature of defendant's conduct which amounted to an act of terrorism against the victims, *People v Poole*, 186 Mich App 213, 214-215; 463 NW2d 478 (1990), and imposed a sentence that was proportionate to the offense and the offender, *Milbourn*, *supra* at 634-635.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Mark J. Cavanagh

/s/ Brian K. Zahra

¹ Defendant cites *People v Bollinger*, 224 Mich App 491; 569 NW2d 646 (1997), to support his claim that the trial court erred in sentencing him as an habitual offender. We find that *Bollinger* is inapposite, however, because that case dealt with a prosecutor's failure to *file* the supplemental charge within the statutory period, and did not address the consequences where the prosecutor fails to *serve* notice of the supplemental charge on the defendant, which is the situation presented here.